No. 4917

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR CHRISTENSEN, ROBERT SMITH and A. C. SMITH,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING

Upon Writ of Error to the District Court of the United States, for the District of Oregon

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Names and Addresses of Attorneys of Record.

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Your petitioners feel that the court in its opinion in the above entitled cause erred in the following particulars:

I.

The court in its opinion has based its decision as to the misconduct of the prosecuting officer upon erroneous facts.

II.

The court erred in finding that the improper remarks of the prosecuting officer were made in reply to similar statements by counsel for the defendants.

III.

The court erred in holding that the entire trial jury was properly apprised of the attempt at jury bribing, in that it establishes a precedent contrary to previous decisions on this point.

ARGUMENT

On page 5 of the opinion in the above entitled cause the court makes the following statement:

> "During the trial on various occasions counsel for the defendants by questions put to the witnesses insinuated that officers of the Government were responsible for such disappearance. Finally the district attorney retaliated by stating that if the defendants would produce Stayton the Government would place him on the stand."

We submit that the court in this finding upon which it bases its conclusion, has been unduly lenient with the prosecuting officer in not setting forth his subsequent remarks and we feel that the court has fallen into error in not passing upon the remarks of counsel immediately following that quoted by the court. Those proceedings were as follows:

> "Q. Let me ask you this: If you know Jim Stayton?
>
> The Court: If what?

Mr. Watkins: If he knows Jim Stayton.

A. I have come in contact with Jim Stayton as a witness in this case. I can't find him now, though.

Q. I will ask you,—you don't know him very well?

A. I have met him as a witness in this case, but that is as much as I know him.

Q. I will ask you, then, if it is not a fact that you appeared in behalf of Jim Stayton before Judge Mears, on August 31st, at which time he was charged with a still and sixteen barrels of mash and two bottles of beer, and if you did not intercede and make a talk for Jim Stayton, and ask that he be charged with two bottles of beer and fined a little fine, or words in substance that conduct.

Mr. Stearns: Just a moment. I don't know whether this gentleman appears as attorney for Mr. Stayton, or not. It would not make a bit of difference in this case whether he did or did not, your Honor.

The Court: Well, that is wholly collateral.

Mr. Watkins: Well, your Honor, Mr. Stayton has been mentioned time and time again in this.

The Court: Well, I know, but the subject matter that you are dealing with, I say, is

wholly collateral. I don't care who Mr. Stayton is, or what kind of a person he is.

Mr. Watkins: I feel, your Honor, that this observation ought to be made to the Court: That it is highly important to show the connection between this witness and that man.

The Court: Well, if you have got witnesses to show that, why, call them; or, if you want to call this witness as your own witness about that matter, it would be a different thing.

Mr. Stearns: I may say to your Honor that if the defendants will produce Mr. Stayton as a witness, we will get that matter cleared up very quickly.

Mr. Watkins: That is the man I would like for them to produce, the government. That is the government's business.

Mr. Stearns: **Yes; and that is the man that was gotten out of the state?**

Mr. Watkins: By whom?

Mr. Stearns: **I have my suspicions, and they are very well founded.**

Mr. Watkins: Well, by whom, now? Let a charge be made here.

The Court: We are going to stop that controversy here.

Mr. Watkins: I think that that statement is improper. The District Attorney ought to be reprimanded for making a statement of that kind.

The Court: I think you ought to withdraw that statement, Mr. Stearns.

Mr. Stearns: **If your Honor please, I will withdraw the statement, so far as the jury is concerned, but I want to say to your Honor—**

Mr. Watkins: Now he is making the statement over again.

Mr. Stearns: **Now just a moment. I want to say to your Honor that that statement was not made without foundation.**

The Court: Well, as that statement was in the presence of the jury I will instruct the jury not to pay any attention to that conversation between counsel, because it is not evidence in this case. Give it no weight whatsoever; put it out of your minds.

Mr. Watkins: I ask for an exception to the District Attorney's remark as being prejudicial and I ask for a showing upon that matter. You can't unring the bell. Now, let's make the District Attorney make a showing. He is evidently trying to let the jury believe that somebody, probably Watkins or somebody, is running wit-

nesses out of the state.

The Court: Well, the fact appears that the witness is not here. I don't know why he is not here myself.

Mr. Watkins: Well, I would like to let them proceed to make a showing, your Honor, or else withdraw the statement.

The Court: He has withdrawn the statement.

Mr. Stearns: Counsel brought this matter on himself.

Mr. Watkins: I could not bring it on myself.

Mr. Stearns: Well, but you did bring it on yourself.

The Court: I understand you withdraw that statement?

Mr. Stearns: I withdraw that statement, your Honor.

The Court: Very well. That is in the presence of the jury." (Tr. pp. 326-330.)

Just the mere challenge to the opposition to place a witness on the stand, while perhaps irregular, is not in itself prejudicial. The statement made in open court in words that can bear no other interpretation than that the defendants were responsible for the spiriting away of a hostile witness, is

far more serious and demands a much greater degree of justification than the statement set forth in the court's opinion.

We feel that the defendants are entitled to have the case reviewed upon the facts as they actually occurred and we further feel that, if the court had not overlooked the more reprehensible conduct of the district attorney, its opinion would have been otherwise.

We submit that the statement that the above remarks of the district attorney were in answer to misconduct of defendants' attorney is an erroneous conclusion of this court.

> " * * * But as a general rule remarks of the prosecuting attorney, which ordinarily would be improper are not ground for exception if they are provoked by defendant's counsel and are in reply to his acts or statements, **unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters touching important issues."** (16 C. J. 911.)

We submit that the remarks of the prosecuting attorney quoted above go far beyond a pertinent reply to any statement made by counsel for the defendants and that they brought before the jury an extraneous alleged fact, to-wit: that Stayton had been spirited away by the defense, and put that statement in evidence upon the unsworn allegation

of the district attorney without giving to the defense the right of cross examination.

Stayton was an important character all through the case. If an ex-government officer had been concealing a witness, even though the witness supposedly is friendly, we submit that that is a fact that may be introduced into evidence by the defense. (22 C. J. 321; Allen v. U. S., 164 U. S. 492, 499.) If counsel for the defense had information that leads him to believe that such is the fact, he is entitled to question witnesses on this pertinent fact. If the government has evidence that the defense has spirited away witnesses, this may be brought out through witnesses who are cognizant of the fact.

Counsel is entitled to the presumption that all questions asked of witnesses are for the purpose of securing a pertinent answer thereto.

On this point it is said:

> " * * * It is not, however, necessarily prejudicial misconduct to ask questions which are improper if they are propounded in good faith. It is no excuse for an unfair and prejudicial cross-examination of a witness that it was provoked by questions asked by accused's counsel to which the prosecuting attorney did not object." (16 C. J. 892.)

The members of this court have all practised law and have all experienced the difficulty of proving facts that they believe to be true. If counsel for defendants had been able to prove by witnesses that the witness Stayton had been spirited away by other government witnesses with whom he was acting, that fact would have been pertinent and admissible, especially in view of the defense interposed that the entire matter was a "frame up." It was through no fault of counsel that the defense could not prove that Stayton had been spirited away by the government witnesses, but the fact is true nevertheless that counsel had ample grounds for questioning Gibson, Moore and Mitchell as to the whereabouts of Stayton. Even if counsel had no such grounds, he is entitled to the presumption that he had, and furthermore a question to a witness regarding any pertinent fact of which it might be possible that the witness has knowledge, is permissible. This is recognized by the courts in the latitude given counsel on cross examination as compared to the circumscribing of direct examination. We contend that even if the questions asked would be improper on direct examination, they were entirely pertinent and proper on cross.

Take for example the only places in the record where the whereabouts of the witness Stayton was questioned. Gibson testified:

"Q. After the grand jury. Now you have

had conversations recently, you said this morning with Mr. Mitchell and with Mr. Moore.

A. Yes.

Q. You stated that?

A. Yes, sir.

Q. On that trip were you sober enough to remember about a conversation with respect to Jim Stayton's whereabouts?

A. (Witness shakes his head).

Q. Did you ask Mitchell where he was?

A. I have asked where he was three or four times.

Q. **Well, you have asked whom? You haven't been out with Mitchell but once, outside of these daily trips up here in the federal building, when you reported pursuant to your subpoena; you were just out with him one day, weren't you?**

A. **That is all.**

Q. Well, whom have you asked several times, then?

A. Oh, people out there in the hall.

Q. I mean, did you ask Mitchell on this trip, and Moore?

A. I don't remember that.

Q. Do you remember you asking them where Stayton was? Do you remember that?

A. I remember of asking. I don't know whether it was on that day or not, though.

Q. **Well, it has been since you—you were subpoenaed to appear here on the 27th, weren't you?**

A. **Yes, sir.**

Q. **The trial was to start the 28th?**

A. **Yes, sir.**

Q. **And you did appear here on the 27th, didn't you?**

A. **Yes, sir.**

Q. And did you see Mitchell and Moore that day?

A. Yes, sir.

Q. And did you ask them on that day where Stayton was?

A. I don't remember whether I did or not that day.

Q. Well, did you ask them at any time since that day where he was?

A. Yes, sir, I have asked them.

Q. And what did Mitchell tell you about Stayton?

A. That he was right here in town.

Q. What did he say he was doing and where he had him?

A. He didn't say.

Q. Didn't Mitchell tell you at that time that he had Stayton in hiding?

A. No.

Q. **What?**

A. **I don't remember that; no.**

Q. **Well now, you would remember it if a thing like that occurred, wouldn't you?**

The Court: **Well, don't argue the case with the man. Go ahead.**

Mr. Watkins: **All right.**

Q. Didn't he say that he knew that Stayton was wanted on a charge of breaking jail and stealing an automobile, and that he had him here in hiding or words to that effect?

A. I don't remember that, no. He said he was right here in town.

Q. Did he say where he was?

A. No, he didn't." (Tr. pp. 114-116.)

(The portions in heavy type quoted above are omitted from the quotation of this testimony in the government's brief.)

On cross-examination, Gibson testified:

"Q. Well, how much did you get personally?

A. Well, there was three of us got twenty gallons between us.

Q. I see, Who were those three men?

A. Al Luark, Jim Stayton and myself.

Q. Now then, do you know where Stayton is at the present time?

A. No, sir." (Tr. p. 121.)

And again on cross-examination:

"Q. Jim Stayton had made a statement?

A. Yes, sir.

Q. Now do you know where Jim Sayton is now?

A. No, sir.

Q. Do you know what statement Jim Stayton made at that time?

A. He had down about Moore giving us fifty gallons of booze.

Q. Anything else?

A. I don't remember anything else.

Q. Any other phases of this case discussed at that time?

A. I don't remember of any now." (Tr. p. 124).

Moore testified:

"* * * He had Gibson well drunk then and was trying to get a little more information out of him, as Stayton told him, at the witness' home the Sunday night before the trial, that they had been hiring witnesses to run off and he wanted to get information out of Gibson in regard to it." (Tr. p. 252.)

Page 99 of the transcript shows the following with Gibson on the stand:

"Q. Have you ever heard Stayton say that he was driving Frank Mitchell's car?

A. No, sir.

The witness did not remember the license number of the car that Stayton drove that night. The witness at that time did not even know Frank Mitchell." (Tr. p. 99.)

This is quoted in the brief of the government as one of the tactics of defense counsel to which the unjustified and prejudicial remarks of government were directed. That the question asked the witness was justified is shown by the testimony of the witness Hart:

> "He had seen Stayton in automobiles of different kinds. Stayton at one time drove up to the store with a machine in which was several cans of alcohol and told the witness he was going to deliver it to The Dalles and that the car was Frank Mitchell's. Witness knew that Frank Mitchell was legal adviser for the Prohibition Department. He did not remember the date this occurred." (Tr. p. 145).

And on cross examination testified:

> "The incident when Stayton spoke of driving Mitchell's car occurred long before the island trouble. The alcohol in the car was in five gallon cans. Witness does not know how Stayton happened to show him the liquor. He told the defendants about the incident the first time he saw them after that, but not for the purpose of having Stayton arrested." (Tr. 153-154.)

In fact the connection of Mitchell with Stayton and the other government witness was amply sufficient to justify the questions asked by the defense which were for the purpose of procuring

testimony which would have been pertinent had it been elicited and which defendants had ample grounds to believe was true.

This attack on the witness Mitchell was taking no unfair advantage because Mitchell himself testified and the government was able to refute these matters by his own testimony had it so cared. As a matter of fact, Mitchell's testimony did not show any connection between defendants and Stayton but did show that Mitchell suspected Hart, a government witness, of trying to secure the disappearance of witnesses and this, if true, was probably because of Hart's fear of his own implication in the matter. (Government's Brief, p. 6.)

Mitchell's testimony was as follows:

> "A. I had information which satisfied my mind that Mr. Hart was active in using money to get the government's witnesses out of this state, and succeeded in so doing. I furthermore had information that Mr. Hart went with Stayton and Gibson and Luark the night that they made—that they went out to the still at the island at St. Paul. I further knew that Mr. Hart, when he first went before the grand jury, declared that he knew nothing whatever about the facts in this case. He came out of the grand jury room, and I met Mr. Neuner and Mr. Neuner told me that fact, and I asked him to take Mr. Hart back and have the grand jury ask

him if he did not receive a telephone call from the vicinity of St. Paul asking him to send Stayton and Gibson out with the clothes of Luark and somebody else, that they had taken off when they started to take some liquor down the river. Hart went back before the grand jury, and I am informed by Mr. Neuner and by Mr. Littlefield that when the question was put to him he then admitted that much." (Tr. p. 332.)

If counsel for the government had any testimony to the effect that the defendants were responsible for the disappearance of Stayton, the testimony should have been produced. The government by its counsel's unsworn charge in open court, without the opportunity of cross examination prejudiced the cause of these defendants before the jury.

Permit us the liberty once more of calling to the attention of this court the case of Turpin v. Commonwealth (Ky), 130 S. W. 186, 30 L. R. A. (N. S.) 794, and once again quote from the same at page 798 in L. R. A. (N. S.):

"* * * The statement of the attorney was evidence of a clearly incriminatory nature. If one accused of crime flees, or attempts to bribe a witness or a juror, or to fabricate evidence, all such conduct is receivable as evidence of his guilt of the main fact charged. It is in the

nature of an admission; for it is not to be supposed that one who is innocent, and conscious of the fact, would flee, or would feel the necessity of fabricating evidence. Moriarty v. London, C. & D. R. Co. L. R. 5, Q. B. 314;

Winchell v. Edwards, 57 Ill. 41; Com. v. Webster, 5 Cush. 316; 52 Am. Dec. 711; Com. v. Brigham, 147 Mass. 415, 18 N. E. 167. Upon the same principle, one who is innocent would not be apt to resort to bribery, either of a witness or of a juror, to insure his acquittal. Consequently, if he resort to that course, it is evidence from which the jury may infer guilt.

At least, it is evidence corroborating the other evidence of guilt, and may tend strongly to remove any doubt left in the mind of the jury as to the prisoner's guilt. It would have been competent for the prosecution to have introduced evidence that the prisoner had offered a bribe to a juror to find him not guilty. The evidence is material in character, and is in chief. But, like all other evidence of admissions, it is to be received guardedly. It is a fact explainable, and, whether explained by other evidence or not, is solely for the jury to apply in the light of the surroundings and of the intelligence of the accused. But, in any event, he was entitled to have the witness who testified to such damaging facts against him

sworn, and an opportunity for the cross- examination, and for counter evidence. In the course pursued in this case, these rights of the accused were denied him. **Even though there was no doubt of his guilt, even if it had occurred in the presence of the distinguished trial judge and commonwealth's attorney, it was nevertheless a fact to be used against him, like all other facts, by authentic documents or out of the mouths of sworn witnesses confronting him at the bar of the court.** Here, his son is charged with having tampered with a juror. It was not shown, nor attempted to be, nor is it claimed, that the prisoner knew of the act, or in any wise authorized it. The young man may have done it on his volition, and out of his anxiety concerning a parent in great trouble.

Under such circumstances, criminal though the act be, the prisoner here would be neither legally nor morally responsible for it, and it would not constitute evidence of any kind against him. Yet the effect of the attorney's statement was as if the prisoner had bribed a juror, or had caused it to be done. The circumstance of itself shows the wisdom of the rule requiring the evidence to be heard in court from the mouth of the witness having the knowledge, and subjected to cross-examination, to counter evidence, and to explanation. Furthermore, the trial judge did not claim to

have heard what passed between the juror and young Turpin. Nor did he see any consideration pass. The circumstance and the conduct of the parties were highly suspicious. More, it was in contempt of the rule and orders of the court. Nevertheless, it may have been the result of ignorance or accident, as it was claimed (though of the latter there is doubt) but there was no conclusive evidence of either motive or consequence. It was certainly explainable, and needed explanation. But opportunity was not afforded for refuting or explanatory evidence. The commonwealth's attorney did not claim to have witnessed the transaction. His statement was pure hearsay evidence. On that score also, it was error to allow it to go to the jury."

This same case was not mentioned by the court in its opinion, nor was the case of State v. Morris, 58 Or. 397, on the point of making known to the jury the fact of the attempted jury bribe. Yet both cases are in point and are the only cases discovered by counsel for either side to be in point.

It seems that the court should fairly and squarely either repudiate the doctrine announced by these cases, or follow it. A careful reading of these two cases, the only cases on this point, show that this court has enunciated a new doctrine on this question and we do not believe that any man has a

fair trial where jury tampering is made known to the jury, unless in fact he is guilty of the tampering. It is not too much to suppose that this honorable court believes that the attempt to bribe the jury emanated from the defendants. If the court does so believe, how can it expect a jury untutored in legal lore to believe otherwise?

As a matter of fact it is the firm belief of defense counsel that defendants had no part in the act of Bradshaw and defendants are entitled to the presumption of innocence.

We believe that the defendants have been deprived of a fair trial by the knowledge given the jury of this episode.

Due to the fact that the court has gone contrary to the rule of law enunciated by the only other cases on this point, we feel that the reasons of the court for so deciding should be given a very careful and exhaustive review.

In conclusion defendants respectfully pray that this court may grant them a rehearing in this cause for the reasons set forth above, which may be summarized as follows:

(1) The decision as to the misconduct of the prosecuting officer is based upon erroneous facts as stated in the opinion.

(2) The court erred in finding that the misconduct of the prosecuting officer was justified by the questions propounded to witnesses by defense counsel, when in fact, those questions were pertinent to the issue and counsel had ample justification for propounding them.

(3) The decision of the court that defendants were not prejudiced by making known to the entire jury the attempted jury bribery is contrary to the rule laid down by all other cases in this point.

Respectfully submitted,

ELTON WATKINS and
JOHNSTON WILSON,
Attorneys for Plaintiffs in Error.

UNITED STATES OF AMERICA, }
DISTRICT OF OREGON, } ss.

We, Elton Watkins and Johnston Wilson, certify that we are counsel for plaintiffs in error in the above entitled petition for rehearing; that in our judgment said petition for rehearing is well founded and said petition is not interposed for delay.

ELTON WATKINS,
JOHNSTON WILSON.